



Australian  
Human Rights  
Commission

# Review of NSW legal protections for victim-survivors of forced marriage

Australian Human Rights Commission

Submission to the NSW Department of Communities and Justice

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# 1 The Australian Human Rights Commission

1. The Australian Human Rights Commission (Commission) is Australia's national human rights institution, established in 1986 by legislation of the Australian Federal Parliament. The Commission is an independent statutory organisation, whose operations are determined independently of the government through the President and Commissioners.
2. The role of the Commission is to work towards an Australia in which human rights are respected, protected and fulfilled, finding practical solutions to issues of concern, advocating for systemic change and raising awareness across the community.
3. The Commission welcomes the opportunity to make this submission to the NSW Department of Communities and Justice with respect to the Discussion Paper regarding the Review of NSW legal protections for victim-survivors of forced marriage. This submission builds on the previous work that the Commission has done to advocate for the strengthening of Australia's response to modern slavery, including with respect to forced marriage.<sup>1</sup>

## 2 Introduction

4. Forced marriage is a serious human rights violation, which disproportionately affects women and girls. A global commitment to work towards the elimination of harmful practices such as forced marriage can be found in Target 5.3 of the United Nations' Sustainable Development Goals, however progress reports suggest that global progress towards this goal has been too slow.<sup>2</sup> The most recent estimates suggest that in 2021 there were approximately 22 million people around the world who were living in a forced marriage on any given day, with two-thirds of victim-survivors being women and girls.<sup>3</sup>
5. Australia is not immune to this problem. Forced marriage is the most common form of modern slavery reported to Australian authorities, with the Australian Federal Police (AFP) receiving 84 reports of forced marriage in 2021-22.<sup>4</sup> When considering these statistics, it is important to emphasise that this is still, in many respects, a hidden crime. For example, Anti-Slavery Australia estimates that only 1 in 5 victims of modern slavery are detected in Australia.<sup>5</sup> It is imperative that Australia takes strong action at all levels of government to eliminate forced marriage and provide protection and support to victim-survivors.
6. This submission addresses a selection of the questions posed in the Discussion Paper. It should be emphasised that this does not comprehensively address all aspects of every question and is not indicative of the relative importance of

particular questions. Rather, it reflects the Commission's relevant expertise in certain areas, and current capacity.

### 3 Preliminary Issues

7. Before addressing some of the specific questions raised in the Discussion Paper, it is important to frame this discussion by highlighting four preliminary issues.
8. The first is to note the scope of this review, which is 'limited to a consideration of the protections for victim-survivors under key NSW laws and any need for reform to those laws'.<sup>6</sup> While the legal framework is clearly important, it is practically impossible to obtain a true understanding of the protections available (and whether existing provisions are sufficient) without going beyond the legal framework to consider the full scope of non-legal supports and services that are available to protect victim-survivors.
9. A comprehensive review that examines not only the legal framework, but also the full range of non-legal supports and services would provide a clearer picture as to the adequacy of existing protections for victim-survivors in NSW.

**Recommendation 1: An expanded review should be conducted to examine the adequacy of existing protections for victim-survivors in NSW, encompassing not only legal protections, but also the full range of non-legal supports and services.**

10. The second preliminary issue relates to cooperation and coordination between the state and federal levels of government. It is acknowledged throughout the Discussion Paper that there are relevant laws and supports also provided at the Commonwealth level. Ensuring that there is a coordinated approach across federal and state jurisdictions to providing protection and support for victim-survivors is critical.
11. While it technically falls outside the scope of this review, it is impossible to obtain a true understanding of the supports available and whether existing provisions are sufficient without looking beyond NSW alone and considering the combined effect of laws and services at both the federal and state levels.
12. NSW is the first jurisdiction in Australia to introduce an independent Anti-slavery Commissioner, with Dr James Cockayne commencing in this role on 1 August 2022. The general functions of the NSW Anti-slavery Commissioner include a number of functions relating to the provision of assistance and

support to victims of modern slavery.<sup>7</sup> The Australian Government has also recently introduced a Bill to establish Australia's first federal Anti-slavery Commissioner, with a core function of the proposed Commissioner being to engage with and support victims and survivors of modern slavery.<sup>8</sup>

13. The prospective establishment of independent Anti-slavery Commissioners at both the NSW and Commonwealth levels provides a unique opportunity to work collaboratively to examine the adequacy of existing protections for victim-survivors at a cross-jurisdictional level, and determine whether improvements can be made to ensure the co-ordinated delivery of support.

**Recommendation 2: The NSW Anti-slavery Commissioner should be encouraged to engage with the federal Anti-slavery Commissioner (once established) to examine the adequacy of existing protections for victim-survivors at a cross-jurisdictional level and determine whether improvements can be made to ensure the co-ordinated delivery of support.**

14. The third preliminary issue concerns the understanding of the concept of forced marriage. The current legal conceptualisations of forced marriage tend to focus on a single point in time as being the moment of legal significance. For example, the definition of forced marriage under s 270.7A of the *Criminal Code Act 1995* (Cth) focuses on the entering into the marriage as being the particular act on which the subsequent offences in s 270.7B are based.

15. However, forced marriage is best described as 'a process rather than an event'.<sup>9</sup> A forced marriage 'can involve a spectrum of coercive and controlling behaviours' and 'the coercion or threats that cause a non-consenting party to enter into a marriage can encompass conduct that began long before the marriage'.<sup>10</sup>

16. A deeper understanding of forced marriage that recognises the surrounding behaviours and understands forced marriage as 'a process rather than an event' is needed to better inform policy makers considering the adequacy of protections and supports provided.

**Recommendation 3: Protections for victim-survivors of forced marriage should be designed to reflect a deeper contextual understanding of forced marriage, recognising that it is best described as 'a process rather than an event'.**

17. The fourth issue is to ensure that protections are child-specific when responding to child victims and survivors, in accordance with Australia's obligations under the *United Nations Convention on the Rights of the Child* (CRC). This is critical given the significant proportion of victim-survivors who are under 18 years of age, with approximately 23% of reports alleging forced marriage offences received by the Australian Federal Police (AFP) between 1 July 2017 and 31 June 2022 relating to persons between the ages of 16 and 18 at the time of the report.<sup>11</sup>
18. A child-specific and child-centred approach incorporates the 'best interests of the child' principle, and children's right to express views, be informed and have their views taken into account during any criminal justice process. Resources and support provided to children must be appropriate to their circumstances and level of development. Tools such as the [Child Rights Impact Assessment tool](#) developed by the Commission are available to inform decision making and assist in assessing the ways that children's rights and wellbeing are affected by new laws and policies.

## 4 Consultation Questions 3 & 4

19. A clear example of the need for greater coordination between the State and Commonwealth levels arises under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (CDPV Act). Section 48(2) gives a 'police officer' standing to apply for an Apprehended Violence Order (AVO), however Schedule 4 of the *Interpretation Act 1987* (NSW) defines 'police officer' as meaning 'a member of the NSW Police Force who is a police officer within the meaning of the *Police Act 1990*'.
20. The practical impact of this is that the AFP, who are currently the lead agency within Australia in terms of the investigation and prosecution of forced marriage cases, do not have standing under the CDPV Act to apply for an AVO on behalf of a victim-survivor in NSW. Expanding the scope of the legislation to ensure that the AFP have standing to apply for an AVO in situations of forced marriage would appear to be a reform that carries little risk, but could enhance access for victim-survivors.

**Recommendation 4: Section 48 of the CDPV Act should be amended to give the AFP standing to apply for AVOs in situations of forced marriage.**

## 5 Consultation Questions 7 & 8

21. Section 35(3) of the CDPV Act currently limits a provisional AVO to imposing any or all of the prohibitions or restrictions specified in s (2)(a)–(e). A provisional AVO cannot therefore use the general provision at subsection (2)(f) to prohibit or restrict ‘specified behaviour by the defendant that might affect the protected person’, or the specific provision at subsection (2A) which provides that an AVO ‘may prohibit behaviour of the defendant that might coerce, threaten or deceive the protected person to enter into a forced marriage ...’.
22. Given that both subsections (2)(f) and (2A) allow for the imposition of prohibitions or restrictions that go directly to the prevention of behaviour that facilitates a forced marriage, excluding these prohibitions or restrictions from being imposed as part of a provisional AVO appears to limit the effectiveness of that order in protecting against forced marriage.

**Recommendation 5: Section 35(3) of the CDPV Act should be amended to allow for the imposition of the prohibitions or restrictions specified in subsections (2)(f) and (2A) in circumstances where the order is being sought to protect against forced marriage.**

## 6 Consultation Questions 9, 10 and 11

23. While reported statistics provide only a limited insight into the demographics of those impacted by forced marriage, it is critical to ensure that protections are available to all victim-survivors and that particular demographic groups are not excluded.
24. One example is ensuring that there are not barriers to accessing protection because of age, with the current definition of a ‘child’ under the CDPV Act being a person under the age of 16 years.<sup>12</sup> This differs from other legislation in NSW that defines a ‘child’ as a person who is under the age of 18 years, including the *Children (Criminal Proceedings) Act 1987* (NSW), *Bail Act 2013* (NSW), *Children (Community Service Orders) Act 1987* (NSW) and *Children (Detention Centres) Act 1987* (NSW). The *Children and Young Persons (Care and Protection) Act 1998* (NSW) distinguishes between a ‘child’ and a ‘young person’, with the former being a person under the age of 16 years and the latter being a person who is either 16 or 17 years old.
25. Under the CRC a child means ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’.<sup>13</sup>



26. The practical impact of a 'child' being defined in this way under the CDPV Act is that a person aged over 16 years but under 18 years potentially faces barriers in accessing AVO protections from forced marriage. For example, the Department is authorised to make an application for an AVO under s 48(2)(c) of the CDPV Act in the case of a child being subject to a forced marriage within the meaning of s 93AC of the *Crimes Act 1900* (NSW). The differences in the way that a 'child' is defined between these two Acts means that the Department will not be authorised to make an application in the case of a person who is either 16 or 17 years of age.
27. A second example is the different threshold that applies with respect to the court making an Apprehended Personal Violence Order (APVO) under s 19 of the CDPV Act. It is not necessary for the court to be satisfied that the person for whose protection the order would be made *in fact* fears the offence or relevant conduct when that person is a child. This exception will not apply to a person who is either 16 or 17 years of age.

**Recommendation 6: The protections available under the CDPV Act to children should also extend to those aged either 16 or 17 years of age to the greatest extent possible.**

## 7 Consultation Question 12

28. There is an emerging body of research highlighting the recognised limitations attaching to forced marriage responses that focus primarily on criminal justice responses.<sup>14</sup> Responses to forced marriage need to extend beyond the application of a criminal justice framework and, in particular, recognise the familial context within which forced marriages often occur when designing responses.
29. Criminal justice responses need to be seen as one part of a whole-of-government response to forced marriage that prioritises victim-centred approaches. This is encapsulated in the National Action Plan to Combat Modern Slavery 2020-25 that emphasises a focus on the provision of 'holistic, gender-sensitive, culturally responsive, trauma-informed, victim centred protection and support to all victims and survivors of modern slavery' as one of the guiding principles.<sup>15</sup> As highlighted above, this also needs to prioritise child-specific and child-centred approach when responding to child victims and survivors.

30. Given this, two key considerations should be ensuring that existing practices and procedures are appropriate to support the current legal protections that are available at both the state and federal levels, and that preventative responses are prioritised. Recommendations 1 and 2 (above) are reflective of these considerations.

## **8 Recommendations**

31. The Commission makes the following recommendations.

### **Recommendation 1**

An expanded review should be conducted to examine the adequacy of existing protections for victim-survivors in NSW, encompassing not only legal protections, but also the full range of non-legal supports and services.

### **Recommendation 2**

The NSW Anti-slavery Commissioner should be encouraged to engage with the federal Anti-slavery Commissioner (once established) to examine the adequacy of existing protections for victim-survivors at a cross-jurisdictional level and determine whether improvements can be made to ensure the coordinated delivery of support.

### **Recommendation 3**

Protections for victim-survivors of forced marriage should be designed to reflect a deeper contextual understanding of forced marriage, recognising that it is best described as 'a process rather than an event'.

### **Recommendation 4**

Section 48 of the CDPV Act should be amended to give the AFP standing to apply for AVOs in situations of forced marriage.

### **Recommendation 5**

Section 35(3) of the CDPV Act should be amended to allow for the imposition of the prohibitions or restrictions specified in subsections (2)(f) and (2A) in circumstances where the order is being sought to protect against forced marriage.

### **Recommendation 6**

The protections available under the CDPV Act to children should also extend to those aged either 16 or 17 years of age to the greatest extent possible.

## Endnotes

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<sup>1</sup> See, for example, Australian Human Rights Commission, *Statement of Support for an Australian Modern Slavery Act* (Letter to Joint Standing Committee on Foreign Affairs, Defence and Trade, 15 November 2017); Australian Human Rights Commission, *Inquiry into the Modern Slavery Bill 2018* (20 July 2018); Australian Human Rights Commission, *Review of the Modern Slavery Act 2018* (Cth) (*Submission to the Statutory Review undertaken by Professor John McMillan AO*) (November 2022); Australian Human Rights Commission, *Submission to Targeted Review of Divisions 270 and 217 of the Criminal Code Discussion Paper* (8 March 2023).

<sup>2</sup> United Nations, *The Sustainable Development Goals Report 2023: Special edition*, 22-23. <<https://unstats.un.org/sdgs/report/2023/The-Sustainable-Development-Goals-Report-2023.pdf>>.

<sup>3</sup> International Labour Organization, Walk Free, and International Organization for Migration, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, 2022. <<https://www.walkfree.org/reports/global-estimates-of-modern-slavery-2022/>>.

<sup>4</sup> Australian Federal Police, *Reports of Human Trafficking and Slavery to AFP reach new high* (Media Release, 30 July 2022). <<https://www.afp.gov.au/news-centre/media-release/reports-human-trafficking-and-slavery-afp-reach-new-high>>.

<sup>5</sup> See Anti-Slavery Australia at <<https://antislavery.org.au/modern-slavery/>>.

<sup>6</sup> NSW Department of Communities and Justice, *Review of NSW legal protections for victim-survivors of forced marriage: Discussion Paper* (2023).

<sup>7</sup> *Modern Slavery Act 2018* (NSW), s 9(1).

<sup>8</sup> The Hon. Mark Dreyfus KC MP, *Establishing Australia's first Anti-Slavery Commissioner* (Media Release, 30 November 2023). <<https://ministers.ag.gov.au/media-centre/establishing-australias-first-anti-slavery-commissioner-30-11-2023>>.

<sup>9</sup> Khatidja Chantler and Melanie McCarry, 'Forced Marriage, Coercive Control, and Conducive Contexts: The Experience of Women in Scotland' (2020) 26(1) *Violence Against Women* 89, 95.

<sup>10</sup> Frances Simmons and Grace Wong, 'Learning from Lived Experience: Australia's Legal Response to Forced Marriage' (2021) 44(4) *UNSW Law Journal* 1619, 1624-1635.

<sup>11</sup> NSW Government, *Review of NSW legal protections for victim-survivors of forced marriage: Discussion Paper* (2023), 17.

<sup>12</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 3.

<sup>13</sup> *Convention on the Rights of the Child*, Article 1.

<sup>14</sup> See, for example, Dr Laura Vidal, *Young women impacted by forced marriage in Australia: an examination of marriage, gender, and harm* (Monash University Thesis, 2023).

<sup>15</sup> Australian Government, *National Action Plan to Combat Modern Slavery 2020-25* (2020), 20.